



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

ELC NO.446 OF 2013

ISAAC WAITHAKA.....PLAINTIFF

VERSUS

GICHEHA NJOROGE.....1ST DEFENDANT

JOHN KAHINGA.....2ND DEFENDANT

AND

ANN NYAGUTHIE GICHEHA.....PROPOSED SUBSTITUTE OF DECEASED 1ST DEFENDANT

RULING

(Application for substitution; 1st defendant deceased and application made for his substitution; application dismissed as the person sought as substitute is not a legal representative of the deceased 1st defendant)

1. The application before me is that dated 26 August 2018 filed by the plaintiff pursuant inter alia to the provisions of Order 24 Rules 1 and 3 of the Civil Procedure Rules, 2010. The plaintiff wants to have the 1st defendant who is said to be deceased, substituted by one Ann Nyaguthie Gicheha, who is said to be his legal representative. The applicant also wishes to have orders for extension of time within which she can apply for substitution and for revival of this suit. The application is not opposed.

2. The suit itself was commenced through a plaint which was filed on 2 July 2013. The plaintiff sued Gicheha Njoroge as 1st defendant and John Kahinga as 2nd defendant. He pleaded that through a sale agreement dated 27 September 1999, he purchased the land parcel Nakuru/Olongai Phase 11/85 measuring 5 ½ acres. He filed this suit claiming that the defendants have entered into a portion of 2 ½ acres of the land and started cultivating it. In the suit he asked for orders of permanent injunction against the defendants.

3. The 1st defendant filed a Statement of Defence vide which he denied having encroached into the plaintiff's land and asserted that he is in occupation of his own land which is parcel No. 117. No appearance has been entered by the 2nd defendant.

4. In this application, it is averred that the 1st defendant died on 9 September 2016. The applicant has deposed that he got information of his death in April 2017, when his advocate informed him that he has been advised by the advocate of the 1st defendant that he is now deceased. He then proceeded to file a citation cause being Nakuru Succession Cause No. 169 of 2017, to prompt the wife of the 1st defendant, Ann Nyaguthie Gicheha, to take up letters of administration for the estate of the deceased 1st defendant. She has deposed that on 14 May 2018, the citation cause was marked as settled and that he was asked to serve the said Ann Nyaguthie with the necessary pleadings. He has annexed a copy of the said order. He has further deposed that he has been ill and was later admitted to hospital hence he could not file this application earlier.

5. I have considered the application. In as much as counsel on record for the 1st defendant does not oppose it, I am not inclined to allow it for the simple reason that it has not been demonstrated to me that Ann Nyaguthie is the legal representative of the deceased 1st defendant.

6. Although the applicant has cited the provisions of Order 24 rules 1 and 3, it is actually Order 24 Rule 4 which applies, since the person who is deceased is one of the defendants. The said provision is drawn as follows :-

4. Procedure in case of death of one of several defendants or of sole defendant [Order 24, rule 4.]

(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on

an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant

7. In the circumstances herein, we have two defendants one of whom has died. You could assume that the cause of action cannot continue against the surviving 2nd defendant alone, although it is not really clear what relationship the 1st and 2nd defendants had, and thus can only continue against the deceased 1st defendant through his legal representative. The key words in Order 24 Rule 3, is that it is the legal representative of the deceased defendant who is to be made a party to the suit.

8. The person whom the plaintiff wants to substitute the deceased 1st defendant is one Ann Nyaguthie. It is said that she is wife to the deceased 1st defendant. That may very well be so, but is she his legal representative? I have no evidence that she has ever been appointed as legal representative of the 1st defendant. The applicant has mentioned that he filed a citation cause and that the matter was settled by a consent. I have seen the said consent but all it provides is the following :-

“That this matter be marked as settled Citor be served with all the necessary documents.”

9. Nowhere in the above consent is there any indication that Ann Nyaguthie Gicheha is appointed as administrator of the estate of the deceased 1st defendant. All that the consent says is that the Citor will be served with all necessary documents. I have no evidence that within this citation cause, Ann Nyaguthie Gicheha was appointed to be administrator of the estate of the deceased 1st defendant. That being the position, she cannot be substituted for the deceased 1st defendant for she is not his legal representative.

10. For the above reasons, this application must fail and it is hereby dismissed.

11. I however make no orders as to costs as the said Ann Nyaguthie Gicheha and counsel on record for the 1st defendant did not deem fit to oppose it.

12. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 28th day of March 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Opar holding brief for Ms. Momanyi for the applicant.

Mr. R.K Langat holding brief for Mr. Ooga for proposed 1st defendant.

2nd defendant present in person.

Court Assistant – Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU